

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



June 24, 2003

Agenda ID #2397

TO: PARTIES OF RECORD IN APPLICATION 02-07-047

This is the proposed decision of Administrative Law Judge (ALJ) Rosenthal, previously designated as the principal hearing officer in this proceeding. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Pursuant to Resolution ALJ-180 a Ratesetting Deliberative Meeting to consider this matter may be held upon the request of any Commissioner. If that occurs, the Commission will prepare and mail an agenda for the Ratesetting Deliberative Meeting 10 days before hand, and will advise the parties of this fact, and of the related ex parte communications prohibition period.

The Commission may act at the regular meeting, or it may postpone action until later. If action is postponed, the Commission will announce whether and when there will be a further prohibition on communications.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:hkr

Decision **PROPOSED DECISION OF ALJ ROSENTHAL** (Mailed
6/24/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Phuong Transportation, Inc. for authority to operate as a passenger stage corporation between points in Pomona, Westminster, San Gabriel, San Jose and Oakland, CA, and to establish a Zone of Rate Freedom.

Application 02-07-047
(Filed July 31, 2002)

Mark S. Rosen and Dean Richards, Attorneys at
Law, for applicant.

Richard Jay Blaskey and Norman Fierstein,
Attorneys at Law, for Xe Do Hoang
Transportation, LLC, protestant.

Matt Gorman, Attorney at Law, for City of
Pomona, protestant.

O P I N I O N

Summary

The application of Phuong Transportation, Inc. (Applicant) for a passenger stage certificate and for a zone of rate freedom is denied.

Procedural History

This application was filed on July 31, 2002. A protest was filed by Xe Do Hoang Transportation, LLC, (Protestant) on August 30, 2002. Protestant is a certificated carrier offering similar service to that proposed by Applicant. The City of Pomona (Pomona) also protested the application asserting that the

proposed pick-up and delivery points within Pomona are inappropriate. Following a telephonic prehearing conference, Protestant was permitted to file an additional protest. At the February 24, 2003 evidentiary hearing, Applicant and Pomona presented a stipulation as to the pick-up and delivery points within Pomona. Pomona withdrew its protest based on the stipulation. Applicant asked that the application be amended to conform to the stipulation. The Administrative Law Judge (ALJ) granted this request without objection by Protestant.

Categorization

This matter was noticed on the Commission Calendar of August 2, 2002. ALJ Resolution 176-3092, dated August 8, 2002, preliminarily categorized it as ratesetting. The preliminary categorization was affirmed by the Assigned Commissioner's Scoping Memo dated December 12, 2002, which reversed the preliminary determination that a hearing was not required.

Facts

Applicant holds charter-party certificate TCP 15056-A. It now seeks authority to operate as a passenger stage corporation between points in Pomona, Westminster, and San Gabriel on the one hand, and Oakland and San Jose on the other hand. It asserts that there are major Vietnamese communities in these areas and there is need for a bus company that caters to this market. Applicant proposes to operate daily service from Southern California to San Jose. One-way fare would be \$40 and round-trip fare would be \$70. At the hearing, Applicant proposed to serve Oakland "sometimes," on an "on-call" service, and also mentioned the possibility of one trip per week. In its brief, Applicant indicated that its service would be "on-call." One-way fare would be \$55 and round-trip fare would be \$100. All fares include a meal especially suited to the Vietnamese

taste. The driver, as well as the office staff of Applicant, will be Vietnamese-speaking.

The application indicates that two 30-passenger coaches would provide service. At the hearing, the evidence showed that Applicant proposes to provide service with two 55-passenger coaches and three 28-passenger coaches.

The major thrust of Protestant's opposition to Applicant is its assertion that Applicant is operating the service now, without waiting for a certificate from this Commission. In his opening statement, Applicant's attorney admitted that Applicant conducted service before it had authority from this Commission. He attributed this improper conduct to the unfamiliarity of Applicant with the rules of the Commission and Applicant's lack of understanding of English. (Applicant's owner testified through an interpreter.) On learning that its operations did not conform to Commission requirements, presumably through the protest, Applicant sought the advice of a consultant (her bookkeeper) and an in-house counsel to correct matters.

Applicant's admission on the witness stand, the statement of its counsel, and the stipulated exhibits of Protestant prove that Applicant conducted operations as a passenger stage carrier without authority from this Commission. Has this improper activity been corrected and has Applicant demonstrated that it can operate within the confines of the regulatory policy and laws enforced by this Commission? We think not, as we explain below.

We look first to Applicant's actions on learning that her operations were not in consonance with the Public Utilities Code. She turned the operation over to Romy Bus Company, LLC (Romy), a certificated carrier. Applicant represents Romy as having the authority to provide the service she was improperly operating. She also leased the two 55-passenger busses to Romy for this service. Her former Vietnamese staff of drivers and reservation clerks continued in their

positions, though ostensibly working for Romy. She maintained the same telephone number that was listed for Phuong Transportation, Inc. and at times even answered the phone and took reservations herself. She did not withdraw prepaid advertisements under the name of Phuong Transportation, Inc. She had the Phuong name painted on the side of the busses. She appears to have taken every conceivable action to make this change in operation invisible to the public.

Next we refer to Applicant's Exhibit 1, which cites the authority granted to Romy by Decision (D.) 99-09-003 and the tariff Romy filed under PSC 12458. Examination of these documents in our files (Rules 72 and 73 of the Commission's Rules of Practice and Procedure (Rules)) reveals that neither authorizes Romy to carry passengers to or from Pomona, Westminster, San Gabriel, San Jose, or Oakland. There is no mention of rates that can be charged by Romy for the service that it is supposedly taking over from Applicant. In fact, Romy does not have authority to provide any regular service anywhere, but only on-call service. The record does not disclose how Romy was selected as a surrogate for Applicant but one would have expected Applicant, her consultant, or her in-house counsel to have verified Romy's authority before permitting Applicant's name to be associated with the transportation.

It was not until Protestant raised the issue of improper operations that Applicant was aware of a potential problem. Perhaps, as Applicant claims, this can be attributed to a lack of understanding of the difference between a certificated carrier and a charter-party carrier. However, we note that Applicant was sufficiently aware of the two types of service to hold a license to perform one and to apply for a license to perform the other. She must have been aware of some distinction.

Applicant asks us to believe that with the assistance of her consultant-bookkeeper and in-house counsel, there will be compliance with the laws, rules,

and regulations enforced by this Commission. Thus, we are to consider the lease of the busses to Romy as a showing of her spirit of cooperation. Similar consideration is to be given the assertion that the business is now run by Romy, and will continue so until such time as Applicant has obtained its proper authority.

With Applicant's lack of understanding of the requirements of a regulated carrier, and her activities upon learning of regulatory problems, we have little faith in her ability to conform to our rules under present conditions.

In her brief Applicant argues,

“Common sense dictates that when the public would benefit by the addition of a competitor, it should take truly horrific conduct to deprive the applicant of the license.” (Brief, p. 11.) (Emphasis added.)

We are aware of our policy of favoring competition in the passenger stage industry. We have often stated that we do not believe that service provided by a carrier without competition is adequate protection of the customers. (*American Buslines, Inc. (1980) 3 CPUC 2d 346.*) While we encourage competition, we expect that competitors will abide by the rules and regulations established by this Commission and by the statutes of California. (*L. A. Top Shuttle, D.02-12-037.*) The facts before us do not present us with such a competitor. Whether Applicant does not understand what is required of her or is unwilling to follow the rules is unclear. Whether she has received poor advice or not followed good advice is similarly unclear. In any event, we have an applicant who has failed to generate our trust that the law will be understood and followed at the present time. The application should be denied without prejudice to a reapplication when Applicant can demonstrate she is better acquainted with the rules and regulations of this Commission.

For purposes of this proceeding it is not necessary to make a finding on whether the actions of Applicant amount to a sham or device to evade regulation. Similarly, it is not necessary to make any finding on the activities of Romy.

Assignment of Proceeding

The application was reassigned to Commissioner Carl W. Wood and Administrative Law Judge (ALJ) Sheldon Rosenthal on October 9, 2002.

Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1. Comments were filed on _____, and reply comments were filed on _____.

Findings of Fact

1. Applicant presently holds a charter-party carrier certificate TCP 15056-A.
2. Applicant seeks authority to perform passenger stage service to the Vietnamese community by engaging in service between Pomona, Westminster, and San Gabriel on the one hand, and Oakland and San Jose on the other hand.
3. Applicant would be in direct competition with Protestant.
4. Applicant admits to operating as a passenger stage corporation over these routes during the pendency of this application.
5. Upon hearing that her passenger stage activities were inappropriate, Applicant consulted with her bookkeeper and an in-house counsel and determined that she must cease this activity.
6. Applicant leased two busses to Romy with the expectation that that carrier would continue the passenger stage service that Applicant was not authorized to perform.

7. Applicant allowed Romy to use the telephone number that Applicant had previously used for this service.

8. Applicant transferred an employee to Romy to handle reservations and telephones related to the service.

9. Two of Applicant's drivers became drivers for Romy.

10. Romy has been operating the service since December 2002.

11. Romy has a passenger stage certificate but does not have authority to perform service from and to the points requested by Applicant in this proceeding.

12. Romy's passenger stage authority only provides for on-call service, not daily service.

Conclusions of Law

1. Applicant's service over the routes for which it is now seeking a certificate was improper.

2. Applicant secured the services of Romy to continue the service without determining that Romy had the requisite authority from this Commission.

3. Applicant's owner presently does not have sufficient knowledge of the requirements of the Commission to give us assurance that she would be able to operate within our rules and regulations.

4. Operation of the unauthorized service by Romy should cease immediately.

5. The application should be denied without prejudice to a reapplication when Applicant can demonstrate she is better acquainted with the rules and regulations of this Commission.

6. This order should be effective today to ensure that the unauthorized service ceases immediately.

O R D E R

IT IS ORDERED that:

1. The application is denied.
2. Romy shall immediately cease its unauthorized operation.
3. Applicant's owner is advised that she may reapply after six months from the effective date of this order.
4. Should Applicant's owner again seek a certificate, she shall have the burden of demonstrating that she has become familiar with the rules and regulations of the Commission.
5. Application 02-07-047 is closed.

This order is effective today.

Dated _____, at San Francisco, California.